Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	**CC Docket No. 02-33**
	)	
Universal Service Obligations of Broadband Providers	)	
	)	**CC Dockets Nos. 95-20, 98-10**
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	

To the Commission:

COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION

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To the Commission:

COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION

The American Public Power Association (APPA) appreciates the opportunity to respond to the Commission's Notice of Proposed Rulemaking (NPRM) in this docket. In the opening paragraph of the NPRM, the Commission states that "[t]he widespread deployment of broadband infrastructure has become the central communications policy objective of the day. It is widely believed that ubiquitous broadband deployment will bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance economic opportunity for the American public." APPA agrees that ubiquitous broadband deployment is vitally important to our Nation. In fact, APPA has worked diligently since the enactment of the Telecommunications Act of 1996 to

ensure that its members have a full and fair opportunity to contribute to the rapid deployment of broadband infrastructure, particularly in unserved or underserved areas.

APPA is deeply troubled, however, by the Commission's actions in this and related proceedings involving broadband deployment. At the urging of the major cable operators and telephone providers, the Commission has elevated the goal of rapid deployment of broadband over all other important goals of the Telecommunications Act. In particular, in this proceeding, the Commission proposes to sweep away the market-opening requirements of the Telecommunications Act for wireline Internet access service, as interpreted by years of Commission decisions. The Commission's proposal is particularly disturbing in view of the Consumers Federation of America's recent objective study showing that the Commission's "hopes that intermodal competition will discipline market power and to create an open, consumer-friendly communications environment cannot be supported by empirical evidence." M. Cooper, *The Failure of 'Intermodal' Competition in Cable Markets* at 1 (April 2002). The Commission's proposed action would also exceed the agency's authority and violate applicable rulemaking requirements.

In this and three related proceedings on broadband deployment, the Commission has advanced tentative conclusions and then asked hundreds of questions about the potential consequences of these conclusions. Many of the Commission's questions raise profound legal, economic and policy issues of the kind that Congress, not the Commission, should resolve. APPA applauds the Commission for asking these difficult questions, but the Commission should stop at the point of reporting its findings to Congress. At the very least, with the stakes for the Nation so high, the Commission

should proceed with rulemaking only after it has learned enough from its four proceedings to propose a set of coherent and internally consistent rules that interested parties can reasonably address in a single omnibus proceeding.

Furthermore, with the spate of recent bankruptcies or retrenchment of many competitive local exchange carriers and overbuilders, and with even the major telecommunications providers and cable operators experiencing financial constraints, the private sector is unlikely to be able to offer advanced telecommunications services and capabilities outside major population centers anytime soon even in the absence of regulatory constraints. As a result, many of the communities that APPA serves face the prospect of being left behind in obtaining the full benefits of the Information Age, as they were left behind in electrification a century ago when the private sector focused on major cities and industries. Many of these communities could provide for their own needs for broadband services and capabilities, just as they provided for their own needs for electricity in the last century. In these circumstances, the Commission should do all in its power, at every opportunity, to ensure that as many of APPA's members as possible step forward to fill service gaps or create essential competition. In the context of this proceeding, if the Commission decides to go forward with rulemaking despite APPA's suggestions to the contrary, the Commission should adopt specific, enforceable measures to make good its promise in the NPRM to "always be alert and ready to act against anticompetitive risks and discriminatory provisioning by dominant providers that result in consumer harm." NPRM, ¶ 5.

INTEREST OF APPA

APPA is a national service organization that represents the interests of more than 2,000 publicly-owned, not-for-profit electric utilities located in all states except Hawaii. Many of these utilities developed in communities that were literally left in the dark as electric companies in the private sector pursued more lucrative opportunities in larger population centers. Residents of these neglected or underserved communities banded together to create their own power systems, in recognition that electrification was critical to their economic development and survival. Public power systems also emerged in several large cities – including Cleveland, Jacksonville, Los Angeles, Memphis, Nashville, San Antonio, Seattle and Tacoma – where residents believed that competition was necessary to obtain lower prices, higher quality of service, or both. Currently, approximately three-fourths of APPA's members serve communities with less than 10,000 residents. At present, public power systems operated by municipalities, counties, authorities, states and public utility districts provide electricity to approximately 40 million Americans.

The patterns that marked the evolution of the electric power industry are now repeating themselves in the communications industry. As private communications providers focus on establishing or further entrenching themselves in large population centers, many smaller communities are at risk of falling behind in obtaining the full benefits of the Information Age. These benefits include vigorous economic development, rich educational and occupational opportunity, affordable modern health care, and high quality of life.

Furthermore, the recent economic downturn and the shakeout in the communications industry have significantly slowed or stopped private-sector deployment of broadband networks and advanced telecommunications in most areas. Numerous competitive local exchange carriers have either cut back on their plans to compete with incumbent telecommunications providers or have gone out of business altogether.[1] The same misfortune has befallen many of the "broadband overbuilders" that had intended to build sophisticated new communications networks to compete simultaneously with providers of voice, video, data and other advanced communications services.[2] According to the National Telephone Cooperative Association, small telephone companies have curtailed investments in broadband infrastructure in rural areas to such an extent that "few additional customers will gain access over the next few years."[3] Even the major incumbent providers of cable and telecommunications services have retreated from their promises to extend their services aggressively outside their traditional markets.[4]

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1 Goodman, "A Hot Sector Burns Out As Investors Stop Calling, Companies Search for Answers," *The Washington Post* at G01 (February 28, 2001), http://www.washingtonpost.com/ac2/wp-dyn/A59646-2001Feb26?language=printer; Kane, "Rhythms Looks For a Way Out," *CNET News.com* (April 2, 2001), http://news.cnet.com/news/0-1004-200-5419260.html?tag=lh.

2 Estrella, "Digital Access Pulls The Plug," *MultichannelNews* (March 1, 2001), http://www.tvinsite.com/multichannelnews/index.asp?layout=print_page&publication=Multichannel+News&webzine=tv&doc_id=17868&articleID=&pub_id=MCN; Gerstein, "No Hand–Wringing Allowed – Focus on the Future," *The TelecomAnalyst* (January 9, 2001), http://www.thetelecommanalyst.com/individual/010109sections/pan4gold.asp.

3 "Telcos: Low Demand Slows Rural Broadband Deployment," *Telecommunications Reports* (December 17, 2001), http://www.tr.com/online/tr/2001/tr121701/Tr121701-25.htm#TopOfPage.

4 *See* Borland, "Local Phone Giants In a Squeeze," *CNET News.com* (March 20, 2001), http://news.cnet.com/news/0-1004-200-5193605.html; "SBC Reports Third Quarter Results,"

In this environment, even if the Commission completely removed all regulatory restrictions on providers of broadband services, it would still take years for the private sector to offer rural and other underserved communities the same services and prices that are available in major population centers. Thus, many of the communities that APPA represents have concluded that they must rely on themselves again if they are to continue to survive and thrive. They believe that truly high speed Internet access and advanced telecommunications services will be as basic to modern life in this century as electricity, water and roads, and that they must develop their own facilities to ensure that their residents will not be left behind in obtaining the benefits of the Information Age. In this proceeding, APPA seeks to help its members achieve these goals.

DISCUSSION

I. CONGRESS, RATHER THAN THE COMMISSION, SHOULD DETERMINE OUR NATIONAL POLICIES AND PRIORITIES FOR BROADBAND DEPLOYMENT

In its opening paragraph, the Commission characterizes its initiation of the NPRM as "launch[ing] a thorough examination of the appropriate legal and policy framework under the Communications Act of 1934, as amended, for broadband access to the Internet provided over domestic wireline facilities." The Commission observes that "[t]he widespread deployment of broadband infrastructure has become the central communications policy objective of the day. It is widely believed that ubiquitous broadband deployment will bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance economic opportunity for

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htttp://www.sbc.com/News_Center/1,3950,31,00.html?query=20011022-1; Estrella, "Time Warner Puts 100K Subs on Block," *Multichannel News* (September 17, 2001).

the American public." APPA agrees that rapid deployment of broadband to all Americans is vitally important for our Nation. As shown, APPA and its members have worked diligently toward advancing that goal, particularly in unserved and underserved areas.

At the same time, however, APPA has significant reservations about the Commission's use of this proceeding to effectuate fundamental changes in the regulatory landscape. After examining the statutory definitions of "telecommunications," "telecommunications service," and "information service," the Commission tentatively concludes that providers of wireline broadband Internet access service, including incumbent local exchange carriers (ILECs) subject to the special market-opening requirements of Section 251(c), should properly be classified as "information service" providers under the Act, rather than as providers of "telecommunications services." As a consequence of these interpretations, the Commission would effectively reverse years of agency orders and decisions that the Telecommunications Act requires ILECs to make their Digital Subscriber Line (DSL) facilities available to potential competitors at wholesale prices as Unbundled Network Elements[5] and to comply with the Commission's line sharing and line splitting rules.[6] Based on this tentative conclusion, the Commission raises a host of questions about the potential consequences of this classification.

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[5] *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 Commission Rcd 3696 (1999).

[6] 47 C.F.R. § 51.319(h) (requiring incumbent LECs to provide non-discriminatory access to the high frequency portion of the loop in accordance with Commission rules); *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition*

The Commission's questions and their potential answers raise serious, direct and dramatic implications for a number of major telecommunications policies and programs that formed the cornerstones of the Telecommunications Act of the 1996. Among these are whether the Commission's proposed action would significantly impair the development of competition, as envisioned in the Telecommunications Act, and whether it would ultimately bankrupt the federal Universal Service Program as services migrate from to the Internet. The Commission's proposed action also has important potential implications for access safeguards, interconnection, security, consumer protection and numerous other important issues.

The Commission itself acknowledges that the classifications at issue "challenging legal, regulatory, and policy questions resulting from unique issues associated with these capabilities, including differing market and technical characteristics." NPRM, ¶ 13. The NPRM does not, however, appear to give enough weight to the potentially major effects of the Commission's proposals or to the fundamental policy changes that they would entail. For example, with respect to public protection issues, the NPRM says, almost blithely, "[w]e ask questions about the relevance of three basic public protection obligations of telecommunications service providers – (i) national security, (ii) network reliability, and (iii) consumer protection – to wireline broadband Internet-access services." NPRM, ¶ 54.

The Commission's deregulatory approach to both cable and wireline Internet access appears to be based on the Commission's acceptance of the arguments of

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Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 Commission Rcd 20912 (1999) (*Line Sharing Order*).

telephone and cable giants that they can safely be freed of all constraints on their broadband activities because cross technology competition will discipline their market power. As the Consumer Federation of America has recently shown, however, these arguments are contradicted by empirical data:

> The fiction of intermodal competition helped convince the courts to overturn structural limits on cable ownership aimed at the video market. The Commission invoked this myth to refuse to require nondiscriminatory access to the advanced telecommunications services provided by cable systems. The same fiction is the basis for the Commission's proposals to abandon the obligation to provide nondiscriminatory access to the advanced telecommunications facilities owned by telephone companies.
>
> The inevitable result of basing policies on competitive fictions, rather than facts, will be escalating consumer harm – high prices, poor service and retarded innovation. [7]

In summary, the Commission's proposed treatment of wireline broadband service raises profound and fundamental legal, economic and policy issues. To support its new position, the Commission must sweep away years of contrary Commission precedents interpreting the Telecommunications Act. Furthermore, the factual premises on which Commission would act are demonstrably flawed. In these circumstances, the gaps between the statute and the results that the Commission seeks to achieve are simply too wide to bridge by rulemaking. Rather, it is Congress, not the Commission, that must act to resolve the issues addressed in this and the Commission's other three proceedings involving broadband deployment. APPA commends the Commission for raising these difficult issues and gathering important information to inform Congress's decisions, but

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[7] M. Cooper, *The Failure of 'Intermodal' Competition in Cable Markets* at 54 (April 2002), http://www.consumerfed.org/Intercomp.20020423.PDF.

the Commission should not itself go beyond giving Congress the benefit of this information and the Commission's expert opinions.

Restraint on the Commission's part is not only required by law, but it is also particularly appropriate where, as here, Congress is actively considering the matters at issue. As the Commission knows, the Senate is now considering the so-called Tauzin-Dingell bill, H.R. 1542, the "Internet Freedom and Broadband Deployment Act." Senators Breaux (R-LA) and Nickles (R-OK) have recently introduced an alternative bill, S.430, "The Broadband Internet Regulatory Parity Act of 2002." Senator Hollings is expected to introduce another major broadband bill in the near future. In the face of this intensive congressional attention, the Commission should abstain from taking any regulatory action at this time.

II. THE COMMISSION'S ACTIONS VIOLATE THE ADMINISTRATIVE PROCEDURE ACT

Assuming (without conceding) that the Commission has authority to act through rulemaking in the circumstances surrounding this matter, APPA has serious concerns about the legality of the rulemaking procedures that the Commission is employing. Under the Administrative Procedure Act, 5 U.S.C. § 553(b)(3), when an agency engages in "rulemaking," as the Commission explicitly claims to be doing in this docket, it must include in its notice "either the terms or substance of the proposed rule or a description of the subjects and issues involved." This provision applies with full force to the Commission. *MCI Telecommunications v. Commission*, 57 F.3d 1136, 1139 (D.C. Cir. 1995); *National Black Media Coalition v. Commission*, 822 F.2d 277, 282 (2d Cir. 1987); *Spartan Radiocasting Company v. Federal Communications Commission*, 619 F.2d 314, 321 (4th Cir. 1980).

The NPRM in this proceeding does not contain the "terms or substance" of any proposed rules, nor does it give interested parties sufficient information to determine the kinds, scope or even the topics of the specific rules that the Commission may adopt. Rather, as discussed in the previous section, the Commission merely sets forth some tentative conclusions and asks dozens of questions about the potential consequences of these conclusions. Given its actions and statements elsewhere, the Commission's conclusions appear to far from "tentative." Thus, the Commission has essentially fired first and only afterward sought to get ready and aim. Under any objective measure, this process falls far short of meeting the requirements of Section 553(b)(3).

Furthermore, as the Commission notes, this docket is one of four interrelated dockets that focus on the regulatory treatment of broadband. In the "Incumbent LEC Broadband" proceeding, the Commission is examining whether ILECs that are dominant in the provision of traditional local exchange and exchange access service should also be considered dominant when they provide broadband telecommunications services.[8] In its "Triennial UNE Review," the Commission is addressing, among other things, whether ILECs must make their broadband facilities available at wholesale prices as Unbundled Network Elements to competitive local exchange carriers (CLECs) for the provision of broadband services.[9] The third proceeding is the recently adopted NPRM on the

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[8] *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That it is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, Commission 01-360, 16 Commission Rcd 22745 (rel. Dec. 20, 2001) (*Incumbent LEC Broadband Notice*).

[9] *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition*

regulatory status of cable modem service, in which the Commission is considering the consequences of its declaratory ruling that cable modem service is an "information service."[10] The Commission states that the combination of these three proceedings and the current NPRM, "build the foundation for a comprehensive and consistent national broadband policy." NPRM, ¶ 8.

Given the interrelatedness of these proceedings and the myriad questions that are yet to be resolved in each of them, it is difficult to see how the Commission's piecemeal approach can lead to a comprehensive and consistent national broadband policy. APPA is particularly concerned that the Commission may succumb to the temptation to rely in this proceeding on tentative conclusions unanswered questions in the other proceedings. It is similarly inappropriate for the Commission to make policy choices based upon developments in other proceedings, especially where the Commission's actions elsewhere are highly controversial and under litigation, as the Commission's cable modem declaratory ruling is.

In the face of all these uncertainties, APPA submits that rulemaking in any of the Commission's four proceedings involving broadband deployment is premature, inappropriate and unlawful. If broadband deployment is as critical to our Nation as the Commission itself maintains, then the Commission should be especially careful to follow

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Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, Commission 01-361, 16 Commission Rcd 22781 (rel. Dec. 20, 2001) (*Triennial UNE Review Notice*).

10 *Regulatory Treatment of Cable Modem Service*, Declaratory Ruling and Notice of Proposed Rulemaking, CS Docket 02-52 (adopted March 14, 2002)(Cable Modem NPRM).

appropriate procedural requirements. In particular, APPA submits that the Commission should withdraw its cable modem declaratory ruling and refrain from rulemaking in any of the four broadband proceedings until it has learned enough to propose a single set of coherent and internally consistent rules that interested parties can reasonably address as part of an omnibus rulemaking. Only in this way will the Commission have a solid foundation on which to build its National broadband policy rules.

III. THE COMMISSION MUST BE VIGILANT IN PROTECTING POTENTIAL NEW PROVIDERS FROM ANTI-COMPETITIVE CONDUCT

Many public power systems have already come forward to fill service gaps or provide essential competition in communications area. Many others would also do so if given appropriate incentives and assurances of protection from state barriers to entry and predatory practices by incumbent providers. As of December 2001, APPA had identified 450 public power systems that operate communications systems capable of providing broadband service. These systems were currently being used to provide the following the following services for other than internal uses:[11]

- fiber leasing – 122
- Internet service provider – 107
- cable television – 91
- cable modem – 59
- long distance telephone – 25

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[11] American Public Power Association. "Public Power: Powering the 21st Century With Community Broadband Services" (2002), which is available at http://www.appanet.org/pdfreq.cfm?PATH_INFO=/legislativeregulatory/broadband/CommunityBroadbandFact.pdf&VARACTION=GO.

- broadband resale – 84
- local telephone – 29
- municipal data network – 163

Even with the elimination of the regulatory constraints at issue in this and the other three broadband rulemakings, there is no reasonable basis for believing that the private sector will deploy broadband new facilities outside of the major population centers any time soon. With so many CLECs and overbuilders bankrupt or in serious trouble, with even the major telephone companies and cable operators pressed for capital, and with substantial unfilled demand for broadband in areas close to the major population centers, elementary principles of economics indicate that profit-seeking entities will first seek to fill demand in the most lucrative markets available – those nearest to the major population centers. It is precisely for this reason that it is so crucial for public power systems to be able to move forward unfettered in the deployment of broadband, particularly in rural areas.

Unfortunately, several public power utilities that have sought to step forward to meet local needs for competitive cable and broadband services have encountered predatory pricing and other anticompetitive practices by incumbent providers. APPA is concerned that the Commission's action in this docket could exacerbate these problems.

For example, Scottsboro (Alabama) Electric Power Board, a public power utility, and Knology, Inc., a private sector cable overbuilder, both filed comments in the Commission's Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, demonstrating that Charter Communications, Inc., is pricing its services far below cost and offering substantial cash bounties to their cable and

high speed Internet customers in order to drive them out of business. In response, the Commission expressed great concern over such practices:

> The allegations made in the comments of Scottsboro and Knology highlight the difficulties of new entrants that, for whatever reason, are capable of competing only within a confined geographic region. The vast resources of a large MSO [Multisystem Operator]may simply prove too much if brought to bear in a targeted fashion against a single system entrant. Moreover, we are concerned about the signal such targeting may send to others who would compete in the MVPD market, and particularly to the financial markets to which a new entrant may well be dependent for resources. However, it is not clear that we have specific statutory authority to address these kinds of problems directly. There has been some suggestion that our authority to prohibit anticompetitive acts or unfair practices under section 628 of the Act would reach targeted and predatory competitive responses. Alternatively, it may be that we would have to seek additional authority from Congress in order to combat such practices, which tend to limit competition and discourage new entry.[12]

While the Commission's statements above apply specifically to incumbent cable operators, they are equally applicable to potential abuses by the wireline broadband service providers that are the subject of this NPRM. In fact, the Iowa Utilities Board recently denied a petition for deregulation sought by Iowa Telecommunications, the incumbent local exchange carrier for most of the state of Iowa, finding that the potential for anticompetitive conduct was too high.[13] Iowa Telecommunications had sought deregulation of its services in a number of communities where it faced competition from the municipal utility. In rejecting Iowa Telecommunications' argument that it faced "effective competition" that would adequately constrain any potential for abuses, the Iowa Utilities Board held:

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12 *Eighth Annual Report on the Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, ¶ 209, released January 14, 2002.

13 *In re: Iowa Telecommunications Services, Order Denying Petition for Deregulation,* Iowa Utilities Board, Docket No. INU-01-1, April 5, 2002.

> The Board is still concerned about the future viability of a duopoly as a form of effective competition. If a large company has the freedom to target isolated markets in turn and drive local competitors out of business, then the market forces of a duopoly are unlikely to be adequate to maintain the duopoly and assure reasonable, competitive rates. In other words, complete deregulation may allow predatory behavior that can, and possibly will, destroy the nascent market being used as the rationale to justify deregulation. Moreover, if an entity with predatory pricing power drives the competition out of business, re-regulation does not offer an adequate solution. In such a scenario, Iowa Telecom gets all its customers back and the CLEC is gone with little likelihood or incentive to ever come back.

Iowa Order, p. 13.[14]

The Commission should take a similarly skeptical view in this proceeding. Moreover, if the Commission elects to go forward with this rulemaking despite APPA's suggestions to the contrary, it is imperative that the Commission make good on its promise in the NPRM to "always be alert and ready to act against anticompetitive risks and discriminatory provisioning by dominant providers that result in consumer harm." NPRM, ¶ 5. The Commission should adopt enforceable protective measures and make it unmistakable clear that it will use these measures vigorously to investigate and sanction anticompetitive behavior by incumbent broadband providers with penalties large enough to deter such anticompetitive behavior.

IV. CONCLUSION

APPA applauds the Commission for its desire to make broadband capabilities and advanced telecommunications available promptly to all Americans, including those in the communities that APPA's members serve. In this NPRM, the Commission has taken the initiative to raise important policy questions that should be addressed by Congress as part

[14] http://www.state.ia.us/government/com/util/_private/Orders/2002/0405_inu011.pdf.

of a comprehensive national broadband framework. Any such policy framework must contain a commitment to vigorously act ensure against anticompetitive practices by incumbent providers.

Respectfully submitted,

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